

## STIPULATIONS

The stipulations of the parties are the same as those specifically set forth in the Award of the Administrative Law Judge.

### **ISSUES**

The Administrative Law Judge found claimant entitled to permanent partial general disability benefits based upon a twenty-four percent (24%) work disability. The respondent and insurance carrier request this review contending that the Administrative Law Judge erred in failing to consider an unknown, asymptomatic, pre-existing condition in claimant's spine, and erred in accepting the opinion of the sole vocational rehabilitation expert to testify. The only issue now before the Appeals Board is nature and extent of claimant's disability, if any.

Although an issue before the Administrative Law Judge, the parties have agreed that average weekly wage is not an issue for the Appeals Board to consider in this review. We adopt the findings of the Administrative Law Judge on this issue.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record, the Appeals Board finds as follows:

(1) As a result of his work-related accident of December 26, 1990, claimant has suffered a twenty-four percent (24%) work disability as found by the Administrative Law Judge. Therefore, the orders of Administrative Law Judge James R. Ward as set forth in his Award of February 10, 1994, should be affirmed in all respects.

On December 26, 1990, claimant injured his back while shoveling sand while performing his work duties for the respondent. Following attempts at rehabilitation, Topeka neurosurgeon K. N. Arjunan, M.D., performed a discectomy and laminectomy at the L5-S1 intervertebral level. After surgery, Dr. Arjunan referred claimant to Topeka board-certified physiatrist Joseph G. Sankoorikal, M.D., for a structured back conditioning program that included physical therapy, low-impact conditioning program, and work hardening.

Dr. Arjunan believes claimant has experienced a permanent partial impairment of function to the body as a whole of ten percent (10%) as a result of the work-related injury. The testimony is unclear as to Dr. Arjunan's opinion of what permanent restrictions and limitations are appropriate. However, Dr. Sankoorikal testified that claimant should obtain a job where he can alternate sitting, standing, and walking. Dr. Sankoorikal believes that claimant can continuously lift up to ten (10) pounds, frequently lift up to twenty (20) pounds, and occasionally lift up to fifty (50) pounds. However, claimant should never lift greater than fifty (50) pounds. Dr. Sankoorikal also believes that claimant should not do any frequent twisting, bending, or stooping, and should religiously follow the biomechanics of the back to avoid aggravation of his symptomatology.

At the request of claimant's counsel, claimant was evaluated by vocational rehabilitation expert Bud Langston of Topeka, Kansas. Mr. Langston has obtained a masters degree in rehabilitation counselor education and has worked as a state vocational rehabilitation counselor with the State of Kansas. In addition, Mr. Langston became the rehabilitation administrator for the Division of Workers Compensation of the State of Kansas in 1985, and in 1987 became director of Kansas Rehabilitation and Clinical Consultants. Mr. Langston currently is a licensed vocational rehabilitation vendor with the

State of Kansas. Mr. Langston met claimant three times as part of the evaluation process and compiled information regarding claimant's social, educational, physical, and vocational background and information regarding claimant's experience, education, training, and capacity for rehabilitation. In addition, Mr. Langston and claimant met with Dr. Sankoorikal to obtain additional information regarding the doctor's final opinion concerning restrictions and limitations.

In performing his evaluation, Mr. Langston utilized the restrictions from Dr. Sankoorikal and assumed claimant would complete a bachelor's degree in public administration. Mr. Langston believes that claimant's work restrictions and limitations restrict him to occupations falling within the light exertional category of labor as defined by the *Dictionary of Occupational Titles* published by the United States Department of Labor. Based upon his evaluation, Mr. Langston believes that claimant's work-related injury has reduced his pre-injury labor market by twenty-five to twenty-seven percent (25-27%). If one did not consider the bachelor's degree, claimant's loss of ability to perform work in the open labor market would be sixty-eight to seventy percent (68-70%). Although claimant expressed a desire to complete a master's degree in public administration, Mr. Langston did not take it into account due to the obstacles that face claimant before such a degree can be obtained. Respondent contends that Mr. Langston erred in failing to take a master's degree into account. The Appeals Board agrees with the analysis of Mr. Langston.

Mr. Langston's testimony is uncontroverted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

After Mr. Langston's evaluation, claimant did complete his bachelor's degree in public administration and obtained a job with the State of Kansas earning the stipulated wage of \$620.56 per week. Comparing the post-injury wage of \$620.56 per week to the pre-injury wage of \$796.36 per week, the Appeals Board finds that claimant has lost approximately twenty-two percent (22%) of his ability to earn a comparable wage as a result of his work-related injury of December 26, 1990.

K.S.A. 44-510e(a) requires a balancing of two factors: ability to perform work in the open labor market and ability to earn comparable wages. These factors are considered in light of the employee's education, training, and experience and capacity for rehabilitation. This statute is silent as to how the percentage is to be computed.

In Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990), the Court held permanent partial general disability as determined by the extent (percentage) of the reductions of an employee's ability to perform work in the open labor market and the employee's ability to earn comparable wages. The Court in Hughes held that both factors must be considered in light of the employee's education, training, experience, and capacity for rehabilitation. In Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Court of Appeals adopted the requirements of Hughes noting that in calculating permanent partial general disability, a mathematical equation must be used. The Schad Court noted that the trier of fact in Hughes gave equal weight to the two elements and averaged the two arriving at a percentage, but held that it was not error to give more weight to one factor than the other.

In the case at hand, the Appeals Board finds that the loss of access to the open labor market and loss of ability to earn comparable wage should be given equal weight. As stated above, the Appeals Board finds that claimant does retain the ability to earn \$620.56 per week, and that claimant's loss of ability to earn comparable wage is approximately twenty-two percent (22%). Giving the twenty-two percent (22%) loss of ability to earn comparable wage equal weight with the twenty-five to twenty-seven percent (25-27%) loss of ability to return to the open labor market, the Appeals Board finds that the claimant has experienced a work disability of approximately twenty-four percent (24%) for which claimant is entitled to permanent partial general disability benefits.

(2) Respondent contends that prior to the injury of December 26, 1990, claimant had a degenerative condition of the lumbar spine at the L4-L5 intervertebral disc level and that if the doctor would have known of that condition prior to the work-related accident, the doctor would have given claimant restrictions similar to those that he now has. Therefore, respondent argues that claimant has experienced no additional disability as a result of this injury. Respondent also argues that Mr. Langston erred in failing to consider prior restrictions in his analysis and evaluation. The Appeals Board disagrees with respondent's contentions. The evidence fails to indicate that claimant was restricted or disabled in any manner prior to the work-related injury of December 26, 1990.

(3) The Appeals Board adopts the findings and conclusions of Administrative Law Judge James R. Ward as set forth in his Award of February 10, 1994, that are not inconsistent with those specifically set forth herein.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward, dated February 10, 1994, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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James R. Ward, Administrative Law Judge  
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